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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

GEORGE A. WISE, Plaintiff/Appellant, v. BERTRAM POLIS, Defendant/Appellee.	2 CA-CV 2008-0054 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20055526

Honorable Javier Chon-Lopez, Judge
Honorable Michael Miller, Judge

AFFIRMED

Law Offices of Joseph H. Watson
By Joseph H. Watson — Tucson
Attorney for Plaintiff/Appellant

Doyle Berman Murdy, P.C.
By Dwayne E. Ross — Phoenix
Attorneys for Defendant/Appellee

H O W A R D, Presiding Judge.

¶1 Appellant George Wise appeals from the trial court's order granting summary judgment in favor of appellee Bertram Polis dismissing Wise's legal malpractice action against Polis, and from the court's denial of Wise's motion for new trial and his motion for reconsideration. On appeal, with respect to the grant of summary judgment, Wise contends that an expert opinion was not required to prove that Polis's representation fell below the professional standard of care. Alternatively, he contends the court erred in determining that he had not hired an expert witness and that the record contained evidence of expert opinion that was sufficient to withstand summary judgment. With respect to the denial of his motion for a new trial and his motion for reconsideration, Wise contends the court erred in light of the fact that he had retained a new expert. Because the trial court did not err or abuse its discretion, we affirm.

Relevant Facts and Procedural Background

¶2 We view the facts in the light most favorable to the party opposing summary judgment and draw all reasonable inferences arising from the evidence in favor of that party. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). In reviewing the trial court's decision, we consider only the evidence before the trial court when it addressed the motion for summary judgment. *See Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 8, 156 P.3d 1157, 1160 (App. 2007).

¶3 Polis represented Wise in Wise's marital dissolution proceedings. After a dissolution decree was entered, Wise sued Polis in this action alleging legal malpractice. Polis eventually moved for summary judgment alleging that Wise had failed to provide full

disclosure of an expert witness, as ordered by the trial court. Wise then disclosed an affidavit of an expert just prior to a hearing on the summary judgment motion on April 16, 2007. During the hearing Polis contended the affidavit was insufficient. The court agreed but denied Polis's motion for summary judgment and instead ordered Wise to provide, by May 14, full disclosure of his expert witness evidence in the form of a report that included the expert's legal opinions and the material facts on which the expert was relying.

¶4 On May 14, Wise moved for an extension of time on the ground that his expert had resigned. He also stated that he did not think he would require an expert to prove his claim. At a subsequent hearing, Wise withdrew his motion for an extension of time, asserted that it would not be possible for him to retain another expert, reiterated that he did not believe an expert was necessary in this case, and conveyed his intent to proceed without one. Polis then re-urged his motion for summary judgment. After additional memoranda were filed, the trial court granted summary judgment in Polis's favor and dismissed Wise's complaint. After the court entered final judgment, Wise moved for a new trial, which the court denied. Wise then filed a motion for reconsideration, which the court also denied. This appeal followed.

Summary Judgment

¶5 Wise claims the trial court erred in ordering summary judgment in Polis's favor. Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). A court should grant summary judgment "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that

reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We review de novo whether there are any genuine issues of material fact and whether the trial court applied the law properly. *Brookover*, 215 Ariz. 52, ¶ 8, 156 P.3d at 1160.

¶6 In a legal malpractice action the plaintiff must prove, inter alia, that the defendant attorney breached a duty owed to the plaintiff by deviating from the professional standard of care and that the plaintiff was damaged by the attorney's negligent representation. *See Phillips v. Clancy*, 152 Ariz. 415, 418, 733 P.2d 300, 303 (App. 1986). Expert testimony is generally required "to establish the standard of care by which the professional actions of an attorney are measured and to determine whether the attorney deviated from the proper standard." *Baird v. Pace*, 156 Ariz. 418, 420, 752 P.2d 507, 509 (App. 1987). However, where the professional negligence alleged "is so grossly apparent that a lay person would have no difficulty recognizing it," expert testimony is not required. *Asphalt Eng'rs, Inc. v. Galusha*, 160 Ariz. 134, 135-36, 770 P.2d 1180, 1181-82 (App. 1989).

¶7 Rule 26.1(a)(6), Ariz. R. Civ. P., provides the parties have a duty to disclose the following:

> The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

See also A.R.S. § 12-2602 (providing additional preliminary disclosure requirements in professional malpractice actions).

¶8 Here, after failing to comply with a court order to provide disclosure of his expert witness's opinion, Wise advised the court that his expert had resigned, asserted that he did not need an expert and indicated that he did not intend to hire another one. When ruling on Polis's subsequently re-urged summary judgment motion, the trial court found that "[w]ithout an expert to testify as to the standard of care and a breach of the standard of care, [Wise] will be unable to prove by a preponderance of the evidence a breach of duty, an essential element in a legal malpractice claim."

¶9 Through various pleadings and his own affidavits below, Wise alleged numerous instances in which Polis purportedly failed to meet the standard of care by exercising poor judgment when handling negotiations over the distribution of the marital estate or by failing to communicate with Wise about matters that were material to the dissolution litigation. In his response to Polis's re-urged motion for summary judgment, however, Wise identified only three specific instances that he argues would not require an expert's testimony. These instances involved Polis's handling of a settlement conference, his failure to correctly calculate Wise's gambling losses, and his failure to inform Wise that Polis perceived the trial judge was biased against Polis.

¶10 With respect to the settlement conference, Wise's primary complaint is that during the conference Polis had agreed Wise should be awarded the value of certain certificates of deposit as part of the marital estate settlement. Wise claims these certificates

of deposit no longer existed at the time of the conference and Polis therefore had been negligent in entering into the settlement. Polis counters that, at trial and at show-cause hearings during the dissolution litigation, Wise testified he had dissipated money from the certificate of deposit accounts. Polis argues that it therefore had been appropriate to concede that the value of the certificates should be attributed to Wise in the settlement. Conceding a point on which the facts and law are firmly with the other side is not negligence. And although we acknowledge Wise's affidavit could be construed to create a disputed issue of fact,[1] we conclude that expert testimony is required at the very least to determine the pertinent standard of care for conceding well-established facts during negotiations. Whether Polis fell below the standard of care in entering into this agreement is not so apparent that a lay person could recognize negligence. *See Asphalt Eng'rs*, 160 Ariz. at 135-36, 770 P.2d at 1181-82.

¶11 Wise also contends he had informed Polis that there was an error in the calculation of his gambling losses. Wise argues that as a result of Polis's failure to correct the error he was wrongfully presumed to have dissipated $100,000 in community assets. In response, Polis points out that Wise testified at trial, personally avowing to the accuracy of his calculated gambling losses based on his gaming diaries, which he now contends he knew were incorrect. Although we again acknowledge the potential existence of a disputed

[1]*But see Wright v. Hills*, 161 Ariz. 583, 588, 780 P.2d 416, 421 (App. 1989) ("[P]arties cannot thwart the purposes of Rule 56 by creating issues of fact through affidavits that contradict their own depositions.").

material fact, we also conclude that expert testimony would be necessary to establish the standard of care for dealing with the client's own damaging testimony.

¶12 With respect to the claim that Polis failed to inform Wise of bias on the part of the trial judge, Wise has never explained specifically how the judge manifested that bias and how it affected the outcome of the dissolution proceedings. We conclude an expert would be required to explain the factors that go into striking a judge for cause or peremptorily, *see* Ariz. R. Civ. P. 42(f); A.R.S. § 12-409(B), how any purported bias had affected the dissolution proceedings, and how Wise had been damaged. *See Phillips*, 152 Ariz. at 418, 733 P.2d at 303 (plaintiff claiming malpractice must show "fact and extent of . . . injury").

¶13 Additionally, to the extent a lay person could identify negligence in any of the three allegations discussed above, they exist in a vacuum along with the numerous other allegations of negligence contained within the pleadings that Wise does not dispute would require an expert. Wise has not put these allegations in sufficient context. This court cannot fully determine which issues were decided pursuant to a stipulation and settlement agreement, nor precisely which stipulations were merely evidentiary, and which issues were decided by hearing or trial. Nor can we fully determine which assets were considered part of the community and separate estates or how the assets were distributed in the final dissolution decree. Without such context, we conclude that the general rule requiring expert testimony should apply and that Wise has not shown that applying the exception would be appropriate. *Cf. Kiley v. Jennings, Strouss & Salmon*, 187 Ariz. 136, 139, 927 P.2d 796, 799

(App. 1996) (defendant bears burden of establishing prima facie case that statute of limitations is applicable; then plaintiff bears the burden of production of showing an exception); *cf. also State v. Kelly*, 210 Ariz. 460, ¶ 11, 112 P.3d 682, 685 (App. 2005) (criminal defendant bears burden to show statutory exception applies).

¶14 Moreover, even if we had sufficient context to determine all the details listed above and even if we could fully comprehend the numerous allegations of negligence, we would conclude that expert testimony was required nevertheless. This marital dissolution proceeding involved determinations of the parties' interests in property and division of multiple forms of assets including real property, personal property, business ventures, and bank accounts that had been acquired, owned or dissipated over varying time periods before and during the marriage. Expert testimony would be essential to explain such concepts as community property, separate property, contribution, co-mingling of assets, as well as applicable presumptions and how they may be rebutted. *See generally Cockrill v. Cockrill*, 124 Ariz. 50, 601 P.2d 1334 (1979); *Battiste v. Battiste*, 135 Ariz. 470, 662 P.2d 145 (App. 1983). All of these concepts would be necessary for the jury to sort out whether the assets as a whole had been divided appropriately and equitably, *see* A.R.S. § 25-318(A), an essential process to determine whether any of Polis's purported negligence resulted in injury to Wise. *See Phillips*, 152 Ariz. at 418, 733 P.2d at 303 (plaintiff must show injury).

¶15 As an alternative to his argument that he did not need an expert, Wise seems to suggest that preliminary affidavits from two experts, which he had disclosed and which were in the record, satisfied the requirement of expert witness disclosure because the

affidavits contained sufficient facts regarding the allegations of malpractice. But it is undisputed that, at the time the court ruled on the re-urged motion for summary judgment, neither of these experts intended to testify at trial. Not only had Wise failed to disclose any other expert who would testify, he had expressly withdrawn his motion for more time to retain a new expert. Therefore, Wise did not meet his obligation under Rule 26.1(a)(6) to disclose the expert witness who would testify "at trial."

¶16 Wise also suggests the trial court's April 16 order, requiring full disclosure of Wise's expert opinion, implicitly ordered the expert to review all 9,000+ pages of the file from the underlying divorce proceedings before submitting a written report. Wise argues this was an unreasonable requirement and that his expert resigned because he was unable to timely comply with this requirement. The transcript from the hearing, during which the court ordered disclosure, does not support Wise's argument. The court stated that the disclosure must include all of the expert's legal opinions and any material facts. The court further cautioned that the report could not merely make "general reference to either the file or a[n] . . . affidavit" prepared by Wise himself. These instructions were reasonable and consistent with the provisions of Rule 26.1(a)(6).[2] We reject any suggestion that the court somehow erroneously caused Wise's expert to resign.

¶17 Because expert testimony was necessary in this case and because Wise conveyed that his intent was to proceed without an expert, the trial court did not abuse its

[2]Despite Wise's suggestion to the contrary, the affidavit of Wise's expert, disclosed on the day of the April 16 hearing, did not satisfy these requirements.

discretion in granting summary judgment in favor of Polis and in dismissing Wise's complaint.

Motion for New Trial and Motion for Reconsideration

¶18 Last, Wise argues the trial court erred in denying his motion for new trial and his motion for reconsideration. Wise does not provide an applicable standard of review or citation of appropriate authority and does not adequately develop any cognizable argument on these issues. He has therefore waived these claims on appeal. *See* Ariz. R. Civ. App. P. 13(a)(6); *Brown v. U.S. Fidelity and Guar. Co.*, 194 Ariz. 85, ¶ 50, 977 P.2d 807, 815 (App. 1998) (claim rejected for failure to provide supporting argument or citation to authority).

¶19 Moreover, upon review of the record, we see nothing from which we could conclude the trial court abused its discretion in denying these motions. *See Delbridge v. Salt River Project Agric. Improvement and Power Dist.*, 182 Ariz. 46, 53, 893 P.2d 46, 53 (App. 1994) (trial court's ruling on motion for new trial not disturbed absent clear abuse of discretion). In his motion for new trial, Wise asserted the judgment was not justified by the evidence and was contrary to law, requiring a new trial under Rule 59(a)(8), Ariz. R. Civ. P., and that a "slight irregularity in the proceedings" had occurred, requiring a new trial pursuant to Rule 59(a)(1). But the arguments he raised are the same as those raised on appeal, which we addressed and rejected above. Specifically, he contends that he had disclosed sufficient expert evidence to create a question of material fact, that the trial court contributed to the loss

of his expert, and that his claim did not require an expert opinion.[3] The court did not abuse its discretion in denying this motion.

¶20 Wise then filed what he called a motion for reconsideration/motion for new trial asserting that he had retained a new expert who would testify at trial. But this motion, filed over three months after the entry of final judgment and thirty days after the court's denial of his motion for new trial, was not timely. *See* Ariz. R. Civ. P. 59(d) ("motion for new trial shall be filed not later than fifteen days after entry of judgment"); *see also Title Ins. Co. of Minn. v. Acumen Trading Co., Inc.*, 121 Ariz. 525, 527, 591 P.2d 1302, 1304 (1979) (contentions in untimely motion for new trial will not be considered on appeal).

¶21 And even had this motion been timely, we would find the trial court did not abuse its discretion in denying it. To the extent we understand Wise's argument, the motion appears to be based on his assertion that he had new evidence to present, pursuant to Rule 59(a)(4). "In order for the trial court to grant a motion for a new trial on the grounds of newly discovered evidence, it must appear that the evidence could not have been discovered before trial by the exercise of due diligence." *Wendling v. Sw. Savings and Loan Ass'n*, 143 Ariz. 599, 602, 694 P.2d 1213, 1216 (App. 1984). And, the evidence "must have been in existence at the time of the trial." *Id.* Wise was afforded multiple opportunities to disclose information about the expert who would testify at trial. After his expert resigned, he asserted

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[3]Wise also nominally suggested in his motion for new trial that he was entitled to summary judgment. He repeats this undeveloped assertion in his reply brief. But issues raised for the first time in a motion for new trial are waived. *See Watson Constr. Co. v. Amfac Mortgage Corp.*, 124 Ariz. 570, 582, 606 P.2d 421, 433 (App. 1979).

he did not need more time because he did not intend to hire a new expert. That Wise appears to have changed his mind after summary judgment does not convert his strategic decision not to produce an expert into a failure to discover evidence despite the exercise of due diligence. Moreover, the information regarding his new expert clearly did not exist as evidence in this case at or before the time the court entered summary judgment. The trial court did not abuse its discretion in denying the motion for reconsideration.

Conclusion

¶22 In light of the foregoing, we affirm the trial court's grant of summary judgment and denial of Wise's motion for new trial and motion for reconsideration.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PETER J. ECKERSTROM, Judge